United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4266

United States Court of Appeals
FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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REPLY BRIEF OF PETITIONER INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Introduction

The Court has already been furnished Petitioner ILA's brief in these matters, setting forth ILA's contentions respecting the various issues raised by the Board's decision.

The briefs filed by the Board and by the Intervenors contain countless erroneous arguments, misrepresentations of respondents' positions and objectives and distortions of facts. To the extent that our earlier brief has addressed itself to points and issues raised, no reiteration is deemed necessary and we will rely thereon. Rather we must selec-

tively respond under the limitations of the Court's rules and in the interest of confining the issues to their essence. Accordingly, this Reply Brief will focus, as it should, on those untreated aspects of the forenoted briefs which demand correction, and/or rebuttal. Inasmuch as some of these points are included in more than one brief, we will proceed to handle them topically.

POINT I

"Generation" of consolidation work by "independent" off-pier warehousemen is illusory and misleading. The means and ends of their services are governed by the ocean-carrier employers of the ILA unit.

It is the position of the ILA that the NYSA employers were denying their employees the opportunity of handling cargo at the piers by furnishing their containers to consolidators for stuffing and stripping. To avoid clear-cut precedents, the Board attempts to create out of whole cloth a new principle of labor law, to wit: that a work-preservation clause is only valid against a unit employer's "suppliers" and not against its "customers." (Board Brief, pp. 25, 27, 28, 31, 34).

The "supplier-customer" theory is specious on its face. It directly contravenes established Board precedent. See *Teamsters Union Local 602* (*Drive-thru Dairy, Inc.*), 145 NLRB 445 (1963). Nowhere has the Board created an exemption from a valid work-preservation clause in favor of a bargaining unit's employer's customers. The Courts have similarly sanctioned the application of a work-preservation clause against customers of a unit's employer. See *National Dairy Products Corp.* v. *Milk Drivers, Local 680,* 308 F.Supp. 982 (S.D.N.Y., 1970). The attempt to insulate customers from the reach of valid work-preservation clauses flies in the face of contrary Board policy and

should be rejected; particularly so when such a principle would *in effect* outlaw every conceivable work-preservation clause in the transportation industry. The ILA and every other Union in that industry would be rendered defenseless to preserve for its members their traditional job tasks.

Herein lie the weaknesses of our opponents' cases. They fail to realize that, *but for* the complicity of carriers, *but for* the furnishing by the carriers of containers to the consolidators (contrary to their obligations to the ILA), *but for* the *preferential* rates given by the carriers to the consolidators reflecting the lower overall costs to the consolidators of handling these containers (and thus enabling the carriers to bypass the wages and fringes otherwise due to ILA unit employees), the consolidators never could have engaged in their stuffing and stripping activities.

It has always been within the control of the various members of the NYSA, employers of ILA longshoremen, to determine where and by whom the loading and unloading of containers which they own or lease, will be performed. By their exercise of control over the release of containers to consolidators, they can assure that the work that rightfully belongs to their own employees is not siphoned away. See *George Koch Sons, Inc.* v. *NLRB*, 490 F.2d 323, 326-328 (4th Cir., 1973); *Enterprise Assn. of Steam, etc. L.U. No. 638* v. *NLRB*, 521 F.2d 885, fn. 16 at p. 894 (D.C. Cir., 1975).

It is therefore inconceivable to this Petitioner how they can successfully maintain that the work was "*generated*" by the consolidators, as "independents," (Conex Brief, p. 30; L. 807 Brief, p. 17) rather than by the carriers who supplied the wherewithall for the former's businesses. Though the Intervenors repeatedly refer to use of the carriers' services on an "unrestricted" basis, it is a fact of life and circumstance, both on the record

and in this industry, that they, in turn, were obligated also *to use the services of the carriers whose containers they were stuffing and stripping.* Without their use of such containers and their commitments to have them shipped *via* the carrier's vessels or facilities, as testified to by Mr. Tattersall* and others, how then could Conex (a/k/a Consolidated), Twin, or any other consolidators in the Port of New York have been able to engage in such activities, particularly since the mid-1950's, and to service the shippers?

Are these the hallmarks of independence? Does this spell out the "*generation*" of work products, as in *National Woodwork* and in *American Boilers*? Is it not obvious that the carriers, in the usual course of events, would have generated this work, as in the past, by having shippers' deliveries sent to the piers directly or by their agents, as in the pre-container days? Is it not further obvious that the "work" being generated is the stuffing and stripping of containers on behalf of the carriers, just as the prefabricated work was being done on behalf of the contractors in *National Woodwork* and *American Boilers?***

In the final analysis, it is the consolidator that supplies a service to the carrier and not the other way around. The irrational and inherently discriminatory proposition propounded by the Board and the charging party Intervenors is consistent with their oft-repeated attempts to conveniently override *National Woodwork* and *American*

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* The containers were and are in several instances tailored to the corresponding measurements and locking devices aboard the respective carriers' vessels (1142-1150a).

** Conex's statement that the "cargo" is the *container* (Conex Brief, p. 38) fundamentally and patently is so absurd that we refrain from discoursing at any length in response. The irrationality of this postulate is particularly obvious in the context of containers of LTL cargo emanating from multiple shippers, which never lose their separate identities, even while being transported in containers, and are destined for multiple consignees.

Boiler. The injection of new terms to distinguish the applicable law is a distinction without a difference.

In the same vein, the proponents of the Board's Decision herein feebly make an effort to confuse the Court by mischaracterizing the "vehicle" used by the disingenuous employers to divert (or: sub-contract) ILA pier-side work to the off-pier consolidators. Thus, they claim that the container is as much a part of a truck or of a railcar as it is of a ship. They either cannot comprehend—or mistakenly overlook—the function of the container in the context of this case.

It is clear that the work at Conex's and Twin's premises, as at those of other consolidators in the Port of New York, is the filling of *NYSA employers' containers*, not containers of Consolidated, of Twin, of the shippers, or even of trucking companies. The container is owned or leased *by an ocean-carrier* for the purpose of transporting the cargo—not by airplane, nor by rail, nor by truck; rather, by its ocean-going vessel. All involved in the handling of the container, as well as in its movement, act in contemplation of its going over the piers and onto a vessel. In the reverse situation of imported containers, it is plain that they are discharged from vessels prior to going over the piers. In instances where they proceed to off-pier distributor stations, they are stripped at those stations for distribution of their cargo.

Accordingly, the Petitioners' claim that a container in the context of this case is part of the vessel, is supported by fact, by logic and by the record.

POINT II

Attempted characterizations of a jurisdictional dispute between ILA and IBT are unfounded. No inconsistency exists between work historically performed by members of the respective unions at the piers.

The evidence produced by Intervenor Local 807 as referred to in its brief and in the briefs of the Board and the consolidators indisputably shows that the driver-employees and the helpers of the latter consolidate packages of ocean-bound freight inside their trucks. ILA has no quarrel with this historically established function. Rather, as set forth more fully *infra*, it is also clear that longshoremen have handled those goods after unloading export cargo from the Teamster trucks, and prior to loading import cargo aboard those trucks.

Longshoremen performed all activities in connection with the cargo on a piece by piece basis from truck to ship. When a trucker arrived at the pier, the ILA complement performed a variety of functions. The ILA checker would measure and check the cargo for damage (85-89a). The cargo would then be delivered from inside the truck directly on to pallets which would be placed tailgate high by ILA labor, and ILA labor would then remove the cargo and pallets to places within the pier or terminal where it was stacked by tierman and general ILA labor. Before a trucker came to pick up cargo, ILA personnel broke it down and stored it at designated locations on the pier or terminal. The cargo was loaded by ILA labor into the truck which was checked by an ILA member (79-81a, 86-89a).

The thrust of the "Dublin Rules" was to delineate these two realms of jurisdiction. Specifically, they preserved the

Teamster jurisdiction to bring the LTL freight to the piers in the manner described by Mr. Mangan and to have it unloaded from the truck's tailgate by ILA members (including the now extinct "public loaders") piece-by-piece on the dock where they would take it, again piece-by-piece, and place it in the carrier's container—the equivalent of the sling-load.

Local 807 alludes to alleged attempts by the ILA to displace members of the Teamsters at an off-pier location of a consolidator (Local 807 Brief, pp. 8-10). However, it overlooks the undisputed fact that *all ILA organizing of employees at off-pier facilities*—as well as performance by ILA members at such facilities—is *within the exclusive jurisdiction of an "inland" local of* the ILA, to wit, Local No. 1730. The Affidavits of Messrs. Connors, Field and Gleason further show that the representatives of the ILA, who appeared on the solitary occasion in 1962 at U. S. Trucking's South Street facility, were officials *of pier-side locals* and held no office in, or bargaining authority from Local 1730 (114-122a).

At pages 16 and 29 of its brief, Conex refers to President Gleason's testimony before the House Committee on Merchant Marine and Fisheries in 1955, at a time when he was ILA's General Organizer. This quotation, taken out of context, is construed as evidencing a recognition of Teamster jurisdiction over stuffing and stripping of LTL containers. The Court is referred to the entire context and particularly to the portion immediately preceding the cited matter (at pp. 834-835). It will then be obvious that the colloquy pertained exclusively to means of reviving the *coastwise* trade. Specifically, it referred to subsidizing vessels running intracoastal on the Eastern Seaboard of the United States and intercoastal via the Panama Canal.

No dispute has ever existed to this date between ILA and the employers regarding use of LTL containers in coastal and intercoastal trade (91a). Moreover, the Court

undoubtedly will note that containers leaving the pier must always be transported on suitable vehicles (chassis), and that ILA has always recognized the jurisdiction of the Teamsters over *the hauling* of these containers by over-the-road trucking companies, *both to and from the piers and terminals* as well as (in the cases of manufacturers' loads) from their places of rest, dockside. Accordingly, the bare reference is *grossly misleading* and entirely inapposite to the situation before you. *We further note that in 1955, Pan Atlantic had not yet entered the containerized Puerto Rican trade and that the size and numbers of containers employed in that trade were small and insignificant.*

From the above, it is evident that there is no "jurisdictional dispute" or intentional "displacement" of Teamster members by longshoremen. As the Board and Courts have stated repeatedly, incidental, secondary effects are inevitable in *every* work preservation situation, that cannot overcome the lawful strivings of the union parties to the respective agreements.

POINT III

The key arguments in the Answering Briefs evince misconceptions of the record, of the law and of the maritime-longshoring industry. The integrity of the Rules survives *this* record.

By playing the statistical game, Twin, abetted by Conex, attempts to interpolate the hard, objective data set forth at Exhibit R-12 (258a) to show that the off-pier consolidation of containers was not primarily responsible for the diminution in the numbers of employees of NYSA members (Twin Brief, pp. 31-33, Addendum; Conex Brief, p. 49). They similarly argue that there is no discernible impact on the ILA unit to be seen from the outcome of these cases, on the simplistic assumption that because the documentary evidence pertaining to Conex and Twin appar-

ently were falsified and since the only individual who testified as to the numbers of ILA longshore employees affected did not personally observe the stuffing and stripping operations, *ergo,* there are not employees to be affected. They further erroneously claim that "ILA and NYSA themselves seemingly have retreated from their claims as the case progressed" and act collusively; that the American public is in their corner and that so-called monopolistic practices, evidenced by severe, secondary impact, requires an exemption from, or modification of, *National Woodwork.*

The cumulative impression gained from the foregoing arguments is: a display of consummate ignorance of the industry involved; a narrow, myopic understanding of the status of the parties and events contained in this record in the *total perspective* of maritime operations in the immense Port of New York; gross exaggeration of Twin's and Consolidated's impact on foreign commerce passing through that Port; and clear over-simplification of the issues herein and the impact on that commerce, as well as on the public at large, which the Board purports to represent. We shall proceed to treat with their arguments, *seriatum:*

1. Twin and Conex evidently are unaware that the Waterfront Commission of New York and New Jersey, in accordance with its mandate from the legislatures of those States, has established a method for stabilizing the longshore work force by periodically eliminating the "casual" pier laborer from the waterfront (known as "decasualization"). In other words, as the amount of available work decreased, waterfront employees who did not work on a regular basis were removed from the registered rolls, leaving fewer and fewer "remaining registrants".* A sum-

* All waterfront employees are required, as a predicate to their employment, to be registered with the Commision.

mary of decasualization of longshoremen and checkers, as compiled by the Waterfront Commission, is contained in the Addendum to this Reply Brief together with the Commission's data on registration and licenses in effect from 1955 to 1974. The Commission's report for fiscal year July 1, 1973-June 30, 1974 further shows that while there was an increase during that period in total general oceanborne cargo in foreign and domestic trades, the total number of manhours decreased from 26 million to less than 24½ million.**

It should be evident from the foregoing factors that a rationale contrived on the basis of a ratio of the number of manhours per employee is unrealistic and therefore untenable. The effects of decasualization, as part of an

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** "The enhanced status of the port is reflected in the recent *gains in the volume and value of the tonnage handled.* This past year, total oceanborne trade reached record levels in the port. Bulk and general cargo increased from 60,543,778 tons in 1972 to 75,473,031 tons in 1973—a rise of 24.7 percent . . . The value of the tonnage handled in the port in 1973 totaled $29.3 billion—an increase of 27.9 percent.

"The tonnage figures cited do not include an additional 70,000,000 tons of 'domestic' cargo consisting of oceanborne coastal, intercoastal and government shipments handled in the port last year, which brought total oceanborne trade in the port to approximately 146,000,000 tons. Bulk cargo includes such items as oil, grains and ores, while general cargo is made up of packaged items of high value. *It is this general cargo which is required under the Compact to be handled exclusively by longshoremen and other waterfront workers registered by the Waterfront Commission.*

"Last year's total of oceanborne trade showed an increase in such general cargo in foreign trade from 14,883,430 tons to 16,231,087 tons while the volume of general cargo in domestic trade increased from 6,106,000 tons in 1972 to 6,411,000 in 1973. This represented a total of 22,642,087 tons of general cargo handled in the port in 1973 as compared to 20,989,430 tons in 1972. *Despite this increase in tonnage, the port showed greater manpower productivity, since total manhours decreased from 26,038,914 in 1972 to 24,410,868 in 1973".* Annual Report of The Waterfront Commission of New York Harbor for 1973-1974. (emphasis added).

The decline in the ranks of longshore employees in inverse ratio to container-wise productivity thus continues unabated.

official policy to effectuate predetermined goals respecting the longshore unit, does not leave room to argue that *additional* man-hours *per man*, as extrapolated by Twin, would otherwise have permitted lesser hours *for more longshoremen*. It avoids the Commission's intent to provide a reasonable, livable income for the remaining registrants rather than marginal wages for more individuals. Twin's official statistician herein further blinds himself to the inescapable truth of 3,000 (more or less) unit longshoremen who "badge-out" each day. Though included among the "remaining registrants", correspondingly covered by the Guaranteed Annual Wage program, *they are unable to obtain work.*

Thus, once again, as the spokesman for an off-pier warehouseman, he proves himself unfamiliar with the aspects of pier-side seniority, overtime, the gang system and other indicia of longshore employment, established by longshore unit contracts and practices over the past half a century or more, which directly and indirectly affect the number of hours worked by each "remaining registrant." Twin's theoretical division of work has no mirror image in the daily life of waterfront employment. It is axiomatic that the *manual handling of piece-meal cargo*, such as LTL merchandise stuffed into or stripped from containers, *generates the number of manhours required to perform such functions*, in contradistinction to the rapid movement of a sealed container. This is amply demonstrated at the footnote of our main Brief at pp. 45-46.

It follows therefrom (as in the instances of the carpenters and pipefitters) that to the extent that available hours derived from the stuffing and stripping of containers at the pier *is increased*, the number of unemployed GAI men *is reduced*. It follows, in turn, that any *additional* losses of work hours automatically will enlarge the ranks of GAI recipients, consequently the cost of GAI, and ultimately further decasualization. It is in this manner that the reduction of LTL container handling at the

piers over the past two decades *has* affected the job opportunities and integrity of the ILA longshore unit; it is *this* sequence of events that must be reckoned with in any computations or extrapolations of figures that *are not* based on pure imagination and wishful thinking. Accordingly, there is no foundation whatsoever for Twin's or Consolidated's engaging in the dangerous manipulation of objective statistics without firm and supportable knowledge of industry history and practices, including outside forces over which the ILA (& NYSA) has no control.*

2. Twin and Consolidated belatedly question that there are (numerous) employees in the longshore unit to be affected by this decision. (See e.g. Twin Brief, Footnote 2 at page 12). They acknowledge, yet discount, *both* the Board's and the Administrative Law Judge's finding that longshoremen have stuffed and stripped containers of LTL cargo at the piers *on behalf of shippers* "since the advent of containerization" (197a; 164a, Footnote 8). Twin erroneously presumes that unless a fact is established on the basis of voluminous affirmative evidence, it either does not exist or has no substantive, probative value. This fallacy is aptly countered by the Administrative Law Judge when he states that though the evidence in the record as to stuffing and stripping of containers by ILA longshoremen on the docks of New York is relatively sparse, *it is quite explicable.* Apart from the issue as to whether containers

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* On the topic of the availability of longshore employment, we must record our disbelief over Twin's commensurately irrelevant and blatantly conjectural "observations" on containerization (Twin Brief, pp. 33-34). It is neither "demonstrable" nor "certain" that ocean transport would have diminished to any extent, *absent* containerization. In effect, Twin argues that since longshore jobs would have disappeared anyway, why should the Court now bother with work preservation contentions.

Twin's contumacious denigration of the Court's veritable role under the Act and its constant dabbling in speculations not supported by the record should not be permitted to detract from the Court's resolution of the issues.

brought to the docks by consolidators such as Conex and Twin were stuffed and stripped by ILA longshoremen,

> ". . . no one challenged that ILA longshoremen did stuff and strip containers on the docks. The record does show then why NYSA companies did have numerous longshoremen on their payrolls designated for stuffing and stripping work as well as for loading containers aboard ship and unloading them from ships." (167a, Footnote 8).

As the Court can well take into account: who but the employers of the longshore employees and their bargaining representative are in the best position to gauge the impact of economic forces on the unit's employees?* Certainly, neither Conex, Twin, nor the Intervenor unions of employees away from the piers are in positions to challenge such assessments, made by the unit employees' principals. More to the point, *in no reported case of work preservation have the losses incurred been traced by the Board or Courts to the precise work involved.*

3. As pertains to the Petitioners' allegedly fatal changes in their positions, we briefly note that the administrative officers and counsel of both ILA and NYSA, at the outset

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* Even in this "sparse" record, the 2500-3000 man loss to the ILA unit can be derived from Mr. Connors' affidavit. It shows that at least 75 employees at one Sea-Land terminal were laid off as a result of the preliminary injunctions obtained by Consolidated and Twin in the District Court for New Jersey (125a). Reasonably assuming that these constituted a portion of the work force assigned to the (recaptured) work on LTL cargo attributable to that encroached upon by Twin and Consolidated, and that such work constituted between one and two percent of the LTL cargo moving through the port, and further, that a portion of the overall work continued to be performed at the piers throughout the period in question, a figure of 2500-3000 employees is a rational one. Compare the bald assertion of teamster losses (70a), in a trucking local that services the entire New York City, wherein losses of business and jobs has *generally* affected driver employment.

of these proceedings, patently were unaware of the carriers' practices as well as alleged rank and file complicity in the manipulation of documents, to appear to show stuffing and stripping of Twin and Conex-handled cargo at the sheds. Nonetheless, this is not determinative of the issues herein. As set forth, *supra*, longshoremen *are* listed on the companies' payrolls for such purposes *and* the ILA's work preservation objective was predicated on contractual Rules and historical jurisdiction, whether or not continuously implemented in practice. *There is no proof whatsoever* of complicity by the ILA or by NYSA, *per se*, including its members who lived up to the contracts, or of knowledge and conspiracy *at the levels of review and enforcement*. If such were the case, how can one account for the costly inspection arrangements, the stoppages, the fines, etc., and the long history of pressures by ILA *against* NYSA.

It is submitted that the foregoing arguments *mislead the Court by diverting its attention* to facts and issues not involved herein. They have distorted its perspective by focusing its attention on the inability of ILA to rehandle the Charging Parties'* containers, as though that were the true criterion of ILA's entitlement to claim or to recapture the handling of LTL cargo. We respectfully urge the Court to come to grips with the issues underlying the charge from *the only real perspective*, viz., ILA's demand for the right to continue to handle pieces and groupings of cargo, emanating from numerous individual shippers, bound for transport aboard ocean-going vessels.

ILA, standing as it were in the shoes of the pipefitters in the *Boiler* case and the carpenters in the *National Woodwork* case, does not have the need to claim to have handled or rehandled the work of third parties (i.e., cargo

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* Charging Parties are Conex and Twin who filed the charges which underlie the Board's Decision and which initiated these proceedings.

consolidated by Conex or Twin). What the Board has failed to perceive is that freight passing over the piers has been handled year in and year out on the East and Gulf Coasts of the United States by workers on the piers, in numerous shapes and forms, in all manner of receptacles and in coordination with various modes of transportation, including local and over-the-road trucks driven by Teamster members. *Unlike shippers loads*—which contemplate bulk shipments and loading at sites of origin by shippers' employees,—*LTL freight still represents break-bulk activity of the kind the longshore unit has always handled.* The benefits to be derived by the LTL shipper are not the same as those of a bulk shipper. And to the extent that such lots have been coming to the carriers at the piers—until this very date—they have been continuously handled, including their consolidation, by ILA labor.

4. ILA vigorously takes issue with those who accuse the ILA and NYSA of aiding and abetting each other. To the extent that any of NYSA's members should aid or abet the consolidators, at the expense of the ILA's unit, ILA is committed to *continue* its opposition to such practices. The Court should not be deceived in this regard. The Dublin Rules *of 1973* were not hammered out at a tea party. The 1968 and 1972 contracts were not the culminations of a duet. Nor should the recent strikeless bargaining agreement between ILA and CONASA be mistinterpreted as a love affair. Be assured that there was plenty of hard bargaining, and final impasse was avoided only by realistic assessments of the existing situations and agreements of the parties upon reasonable terms. Accordingly, their argument is made of whole cloth.

The change in NYSA leadership thus did not constitute a change in direction. Nor did it bring about a collusive, insidious partnership between ILA and the stevedores.

If anything, it enabled ILA *to exert additional pressures* on the principle, direct employers of its pier-side members, to use their votes and influence to compel the carriers to live up to their agreements. And, as the record conspicuously shows, *the carriers*—not the stevedores—*continued to be* the objects of the ILA's demands and it was *the carriers who repeatedly responded* to the Union's insistence on closing loopholes in the enforcement of the Rules (See documents 266-268a; 274-280a).

It is hardly conceivable that parties to a contract in any industry would go to the extremes exhibited by these documents, including threats by the Union of its imminent invocation of a clause in their agreement which *permissibly* could vitiate that very agreement.* Certainly in the context of the history of the parties in the longshore industry, a "going through the motions" argument is manifestly specious and desperate, and not to be regarded seriously by any yardstick.

5. (a) Consonant with its misconception of its role in the spectrum of maritime transportation, Twin equates the impact on the American public with its own fate. (Twin Brief, pages 28-29, 58-59). It even has the temerity to align American shipping with the secondary effects "upon the entire off-pier consolidation industry in and around New York. . . ." It appeals to the Court's sympathy and instincts by alluding to itself as a "relatively small . . . father and son operation" (Footnote 22, page 59), regardless of the cumulative impact of the operation of similar and larger consolidators on the livelihoods of up to 3,000 longshoremen and their families, or on the viability of the Port which they service.

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* As the record shows and the Court well-knows, contracts are not easily arrived at in this industry. Their reopening or termination is not to be taken lightly, even by General Counsel and the Board.

We respectfully submit:

First, that the problems of overages, delays, etc. attendant to the *rehandling* of containers furnished to it by the disingenuous employers of ILA labor patently would have no occasion to occur as and when those containers are *initially* stuffed at the piers by the ILA personnel. These "problems" to consignors and consignees are the incidents of rehandling, *not* of *original handling*.

Second, the impact of raised assessments to support GAI upon the shipping industry, which in turn might be passed on to the shipping and consuming public, as well as the tense, stressful relations between the ILA and NYSA that are practically inevitable to follow from the Board's Decision, together with the foreseeable impact on the Port of New York, more portentiously overshadow any minimal costs or inconveniences to the shippers of cargo or to the carriers. Once again, the standard is not (merely) the impact on the public at large; it is *the public interest* in permitting primary activity by a union against the employee and the employer of employees whom it represents, as the Court in *National Woodwork* concluded from its analysis of legislative history and background to Sections 8(e) and 8(b)(4)(B) of the Act. It is *this* public interest that the Regional Director and General Counsel perceived when they dismissed the charge in the *ICTC* case. It is *this* interest which the Board affirmed in *National Woodwork* and *American Boiler*. Unfortunately, the Board here has strayed, disoriented by the multiplicious arguments and factual confusion engendered by General Counsel, and by the Charging Parties in particular. We fully trust that this Court will not be similarly waylaid by the sheer volume of erroneous legal arguments, compounded by the conglomeration of factual impedimentae.

(b) And here we get close to the very heart of this case. For what the Court has before it are but two of numerous off-pier trucking or consolidation stations doing business

within a 50-mile radius of one of the largest ports in the world, through which approximately 200,000 LTL containers pass in the course of the average year. The Charging parties' share of that cargo apparently amounts to *less than* 2% of the total. Nonetheless, *they* stridently purport to evaluate the impact on the longshore unit *of the totality*, as well as to test the validity and elasticity of the Rules, on the basis of a record confined to *their* history and operations which (particularly in Consolidated's case) has *not* yet been shown to be typical by any measure, or referable to the situations of consolidation throughout the port and of other consolidators. The Board swallowed the bait!

The record herein manifestly is inadequate to support the Board's momentous determination that the Rules are invalid. By its limitation to the immediate facts of the controversy raised by the Charges before the General Counsel's office, it fails to take in the panorama of 98% of LTL cargo handling in the Port of New York; it gives no significant insight into the operations of the Rules, generally. On the other hand, the background to the Rules as well as to the Dublin implementation, also contained in the record, adequately show that wherever and however they were enforced against the employers of ILA labor, they were always focused at the ocean carriers, by a piqued and frustrated ILA.

Indeed, the implications by what is left unsaid or treated indirectly, are more compelling than what is contained. Thus, though the evidence may conclusively show that ILA longshoremen only sporadically interdicted containers stuffed at *Twin's and Conex's premises*, there was no cause to present evidence nor is there any question (as shown above), that *unit employees performed LTL reconsolidation work on cargo consolidated on the premises of other off-pier consolidators as well as on packages brought directly down to the pier in the usual, traditional manner.* As the Board stated, this work clearly was per-

formed from the very "advent of containerization" to the present time. Moreover, it is undisputed that employees retained for the purpose of stuffing and stripping were employed throughout this period at Sea-Land's Shed 290 at Elizabeth, New Jersey as well as at the facilities of that and other employers throughout the port and through the period in question. Neither the Board nor the Court is left in doubt that the performance of stuffing and stripping LTL containers took place at the piers and that this was traditional longshore work.

The Board, therefore, is wholly in error herein when it states that ". . . that work was performed merely as an adjunct to the unit's principal and traditional work of loading and unloading cargo, however contained, on and off ships belonging to members of NYSA." (Board Brief, p. 24). The precise work in question, by whatever term it may be described, unalterably and ineluctably *is work within the longshore unit*, "pertaining to the . . . loading and unloading of cargoes . . ." (See description of certified longshore unit, *Matter of New York Shipping Association, Inc.*, 116 NLRB 1183 (1966) at Footnote, page 6, our Main Brief).

Similarly, Judge Ordman notes (172a) that:

> "As was the case in *National Woodwork* and in other legitimate work preservation cases, it is not at all unusual that more than one entity performs or has performed the work in dispute. This is particularly true where, as in the instant case, the work in dispute is only a portion of the operations of the two entities. Thus, here the stripping and stuffing was only a part of the longshoremen's functions and, in the case of Consolidated and Twin, much of their operations consisted of receiving cargo from individual shippers and delivering cargo to individual consignees together with services incidental to these functions, an area of activity never sought by the ILA."

Here again, though the record did not go into great detail as to what these other functions are, there are sufficient inferences from which the reader can conclude that the Rules and their enforcement would not put the Charging Parties out of business. These consolidators can continue to service the shippers of less-than-container loads cargo, through pick-ups, deliveries, processing of documentations, and delivery of assorted merchandise in sufficient quantities in trucks to the pier in the manner that same has been performed not only in the pre-container days by Local 807's (now President) Joseph Mangan but as obviously has continued to be the case to the present time as to shippers—and consolidators—who bring their cargo down to the piers for consolidation at the stuffing and stripping sheds. (See 79-81, 85-89, 90-92a). This further detracts from the "impact" and the "monopolizing" arguments raised by the Board as well as by the Intervenors in their briefs. (Board Brief, p. 37; Twin Brief, p. 60; Conex Brief, p. 43).

6. The "monopoly" alluded to in the Supreme Court's opinion in *National Woodwork* ostensibly *did not* refer to the impact on third parties, such as Twin and Consolidated. It is evident from the facts in *National Woodwork* and *American Boiler*, as in other similar cases, that *as a practical matter, all* of the work in question in the locales involved, performed by non-primary subcontractors or fabricators, were affected by those unions' valid work preservation objectives.

Rather, the monopolistic practices as to which the Court looked askance would be where a union applies pressure to obtain all of the *precise work* in the industry. This is demonstrated, e.g., by the *Naval Supply Center* case, where the union was seeking to obtain for its members *longshore work performed at piers* where unit employees had never engaged in such activity. Indeed, there are several ports and terminals within the jurisdictional area of the ILA

where non-ILA employees perform the identical work at *shipside locations* as is involved herein. Pressures by ILA to secure such work for its members, though not at issue herein, might present the situation envisioned in the Court's *dictum*.*

7. Twin and Consolidated acknowledge that the majority in *National Woodwork* clearly recognized that work preservation claims could involve secondary effects, as "*is here conceded by all parties.*" However, they argue, since the secondary effects in *National Woodwork* and *American Boiler Manufacturers* were minimal, the respective Courts did not "examine" the secondary effects therein and therefore those cases should not be applied in determining the instant complaints. They claim that the more serious and pervasive the adverse secondary effects are that ensue in the wake of a union's work preservation claim, the more it can be reasonably concluded that the union had earlier abandoned or relinquished the particular work in dispute and the less appropriate it must be to vindicate that claim—*even if valid* (See Conex Brief at pp. 25, 44; Twin Brief at pp. 58-59).

There is absolutely no basis in law for the proposition urged by Intervenors herein that the secondary consequences upon charging parties *ipso facto* invalidate the Rules on Containers. Not a single case has ever suggested that the economic injury to a third party is relevant in determining the validity of a work preservation provision. Even if its application will cause a cessation of business with the third party causing it to go out of business, this is not a factor to be given any weight. See *Local Union No. 636 Plumbers* v. *NLRB*, 430 F.2d 906 at 910, fn. 3 (D.C. Cir., 1970).

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* See *Enterprise Association of Steam, etc. Local Union No. 638* v. *NLRB*, 521 F.2d 885, 900 at fn. 36 (D.C. Cir., 1975) where the Court distinguishes between the "impermissile *objectives* of secondary activity and the permissible *effects* of primary activity".

The extent to which the employees in the affected unit, whether in numbers or by length of time, have engaged in similar activities is not determinative. If such were the case, then the equities of the prefabricators and their employees in *National Woodwork* and *American Boilers* as in all the other cases cited hereunder, necessarily would have prevailed over those of the on-site general contractors and their employees. What Twin and Conex are in effect saying is that the longer that the third party consolidator (as the third party fabricator) can "get away with it," in terms of time and extent of work, the greater is the vesting of equities in the third party and its employees (Twin Brief, pp. 58-59; Conex Brief, pp. 39-41; L. 807 Brief, p. 17).

Such an argument carries *very dire implications*. For if the Court were to concur with them and, in effect, rule that abandonment takes place each and every time that work is allowed off-site, then labor strife is inevitable in all such situations. Each and every labor organization in this country will be on the alert—as a result of such a determination—that the loss of one iota of its jurisdiction will mean its relinquishing its right to perform that type of work or to engage in that aspect or portion of its work, *notwithstanding* that there is no particular need at the moment for unit employees to engage in the work in question. They will then be on notice that any future drop in the work rolls will result in unit unemployment, having given up that aspect of the work to employees in other units (often) represented by other labor organizations.* The consequence will be an endless series of job actions and disputes by labor organizations throughout the country with the objective of keeping the jobs in a "bank" for rainy

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* Under this argument, ILA should never have permitted even Dravo boxes to cross the piers without rehandling and certainly not containers of larger sizes, at times when the impact of such relatively small containers upon the employment of employees in the ILA unit was negligible. (See Gleason affidavit, 91a.)

days ahead. Indeed, § 8(b)(4)(D) cases* are frequently grounded in these very anticipations and arguments.

They thus challenge the Court to issue a decision enforcing the Board's Order in order to cause the Supreme Court to "revisit" *National Woodwork* (Twin Br., p. 55). While *National Woodwork* admittedly was a 5-4 decision, such an argument would require—if not mandate—periodic challenging of all such divided decisions by the Supreme Court on that basis alone, a position which is as impractical as it is offensive. The Board and the Courts have been able to judiciously and judicially apply the principles of *National Woodwork* to a variety of situations that make good sense, both in law and in the "world of practical labor relations," as shown in Decisions cited in our main Brief.

But the best response to this argument is probably contained within *National Woodwork* itself where, the Court pointedly remarked:

> "The Woodwork Manufacturers Association and amici who support its position advanced several reasons, grounded in economic and technological factors, why 'will not handle' clauses should be invalid in all circumstances. *Those arguments are addressed to the wrong branch of government. It may be 'that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress.* Congress has demonstrated its capacity to adjust the Nation's labor legislation . . ." 386 US at 644, 18 L.E. 2d at 378. (emphasis added)

Inasmuch as the Boar dis an adjudicatory tribunal, its function is the interpretation and application of existing law to the cases before it for determination and not the modification of national labor policy, which, as the Court declared, is a matter exclusively within the province of the Congress.

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* "Jurisdictional" disputes.

Conclusion

The Board's and Intervenors' assertion that NYSA's members are neutral bystanders innocently caught up in the ILA's attempts to achieve its objectives purportedly aimed at the consolidators, is to ignore the realities of this labor conflict and the process by which NYSA was confronted with conflicting commitments and practices. Management had negotiated, presumably in good faith, a collective bargaining agreement which obligated its members to preserve for its employees the residual work of stuffing and stripping containers as to which its employees did not even obtain the minimal royalties when stuffed elsewhere.*

When certain disingenuous members within the management Association gave out their containers to be stuffed by employees other than their own, they "could hardly have expected the employees to acquiesce in the blatant violation of their contractual rights." (*Enterprise Association, supra,* at 895. See Footnote 23 cited thereat). The following language of the Court in *Enterprise,* though in another context, is equally fitting here:

> "'The legal effect of the Board's test is to allow an employer to bind his own hands and thereby immunize himself from union pressure occasioned by his employees' loss of work. In one act, the employer helps to create a labor conflict and simultaneously wash his hands of it.' . . . Thus, to accept the Board's characterization of [the employer] as a neutral bystander under these circumstances would allow the 'Cinderella-like transformation of an obviously involved party', and would both render nugatory the commitment which

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* The royalty would amount to approximately $40.00 a long ton (on a 20 ton container). No royalties ever applied to, and therefore never were demanded or collected on, containers handled by Twin and Conex.

> [the employer] made and demean the collective bargaining process which is the cornerstone of labor relations in the United States. The Board insists on closing its eyes to the circumstances surrounding the creation of this labor dispute, circumstances which belie the assertion that [the employer] is a neutral caught between the contending forces really involved in the work preservation controversy." (Id., 895-897)

The record clearly enough demonstrates that this, then, is the posture of the NYSA in these proceedings. For *its* members were those who were at fault. The Board here once again "insist[s] upon closing its eyes to the circumstances surrounding the creation of this labor dispute, circumstances which belie the assertion that [NYSA] is a neutral caught between the contending forces." Certainly, this Court, as the repository of Congress' faith in its ability to discern administrative error, must not and will not close *its* eyes to the true relationships of the parties to this proceeding within the contemplation of the Act.

WHEREFORE, ILA again urges that the Board's clearly faulty Decision and Order be set aside and vacated.

Dated: March 1, 1976

Respectfully submitted,

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International Longshoremen's Association, AFL-CIO

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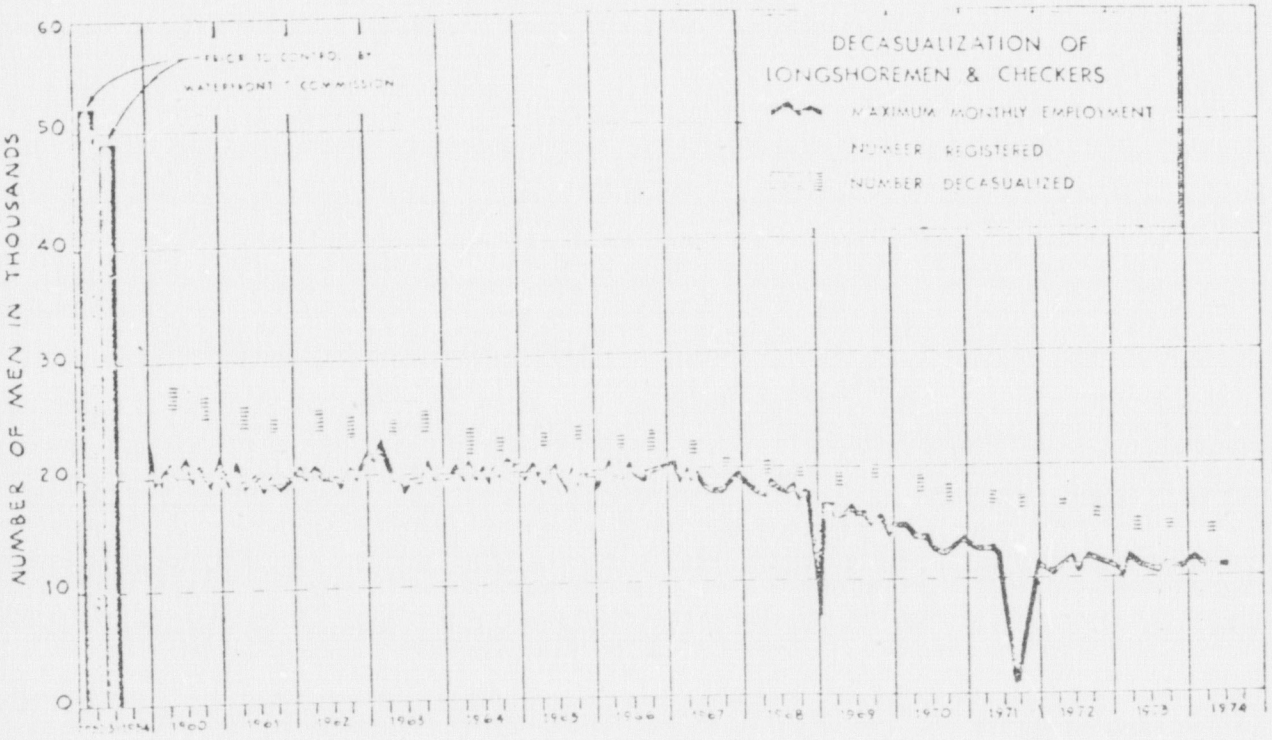
Of Counsel



DECASUALIZATION OF LONGSHOREMEN AND CHECKERS

		Number Decasualized	Remaining Registrants
1st decasualization	June 3, 1955	7,141	31,574*
11th decasualization	May 11, 1960	1,807	28,355
12th decasualization	October 27, 1960	1,577	27,535
13th decasualization	May 11, 1961	1,859	26,920
14th decasualization	October 26, 1961	1,536	25,754
15th decasualization	May 10, 1962	1,498	25,758
16th decasualization	October 25, 1962	1,012	25,843
17th decasualization	May 10, 1963	1,182	25,218
18th decasualization	October 22, 1963	1,523	25,997
19th decasualization	April 10, 1964	2,096	24,172
20th decasualization	October 15, 1964	1,715	23,084
21st decasualization	April 16, 1965	934	23,796
22nd decasualization	October 7, 1965	581	23,920
23rd decasualization	March 31, 1966	1,070	23,332
24th decasualization	November 7, 1966	1,226	23,471
25th decasualization	March 31, 1967	1,142	22,100
26th decasualization	October 6, 1967	954	21,515
27th decasualization	April 12, 1968	903	20,901
28th decasualization	October 18, 1968	770	20,384
29th decasualization	April 22, 1969	999	19,973
30th decasualization	October 3, 1969	1,022	20,627**
31st decasualization	April 13,1970	1,098	19,512**
32nd decasualization	October 30, 1970	1,012	18,651**
33rd decasualization	April 2, 1971	715	18,115**
34th decasualization	September 30, 1971	514	17,742***
35th decasualization	March 30, 1972	227	17,626***
36th decasualization	September 27, 1972	523	16,316***
37th decasualization	April 9, 1973	930	15,368***
38th decasualization	September 27, 1973	330	14,792***
39th decasualization	March 25, 1974	423	14,409***

* Does not include craftsmen whose registrations were required on or after May 27, 1957.

** Does not include warehousemen, container repairmen, and other persons required to be registered on or after September 1, 1969.

*** Does not include 1969 Legislation registrants.

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Addendum.

APPLICATIONS AND REAPPLICATIONS RECEIVED AND PROCESSED DURING FISCAL YEARS

As of June 30th

	1955	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974
Longshoremen	5,196	3,983	2,926	2,141	3,189	1,640	1,566	1,283	3,107	1,557	1,846	4,810	1,741*	1,196*	1,126*	1,192**
Checkers		398	265	134	613	171	453	286	276	320	516	1,233	87	0	2	0
Pier Guards[a]	458	2,415	335	168	321	199	418	2,081	472	699	1,014	858	612	612	573	404
Pier Superintendents	88	88	73	84	176	41	37	47	73	116	57	131	82	67	60	74
Hiring Agents	147	127	107	119	103	66	51	127	92	169	66	172	139	69	63	77
Stevedore Companies[b]	7	45	0	36	1	29	0	53	5	53	7	99	32	117	19	121
TOTALS	5,896	7,056	3,706	2,683	4,403	2,146	2,525	3,877	4,024	2,914	3,506	7,303	2,693	2,061	1,843	1,868

(a) Pier Guards are required to renew licenses every third year.

(b) Stevedores are required to renew licenses every second year.

(c) Includes 640 warehousemen, container repairmen, and other persons required to register under amendments to Waterfront Commission Act, effective September 1, 1969.

* Includes 631 1969 Legislation Applicants.

** Includes 711 1969 Legislation Applicants.

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Addendum.

REGISTRATIONS AND LICENSES IN EFFECT DURING FISCAL YEARS

As of June 30th

	1955	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974
Longshoremen[a]		24,182	22,661	22,079	22,691	20,408	19,792	19,110	18,352	17,026	16,612	17,646	16,367[b]	16,006	14,226	13,704[c]
Checkers	31,639	4,268	4,140	4,095	4,503	4,197	4,511	4,397	4,220	4,115	4,335	3,979	3,714	3,557	3,176	3,006
Hiring Agents	592	622	589	607	609	578	565	606	631	600	559	602	605	545	493	512
Pier Superintendents	365	411	392	403	438	418	417	414	430	417	365	403	406	424	374	395
Pier Guards	3,009	2,021[a]	2,047	1,961	1,756	1,652	1,801	1,551	1,630	1,654	1,637	1,548	1,485	1,405	1,291	1,064
Stevedore Companies	52	39	36	33	29	29	28	49	49	50	46	93	106	109	117	113
TOTALS	35,657	31,543	29,865	29,178	30,026	27,282	27,114	26,127	25,312	23,862	23,554	24,271	22,683	22,046	19,677	18,794

(a) Supervisory personnel required to be licensed under Waterfront Commission Regulations effective January 1, 1960.

(b) Includes 1,785 warehousemen, container repairmen, and other persons required to be registered under amendments to Waterfront Commission Act, effective September 1, 1969.

(c) Includes 2,163 1969 Legislation Registrants (warehousemen, containermen, etc.)

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Addendum.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITITON TO REVIEW AND SET ASIDE ON ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230 That on March 1, 1976, she served 2 copies of Reply Brief of Petitioner International Longshoremen's Association, AFL-CIO on

(see reverse side)

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

.....

Sworn to before me this
1st day of March, 1976

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0922560
Qualified in Nassau County
Commission Expires March 30, 1977

The following have been served by mail:

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